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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 817

THOMAS F. BUCK and MARY P. BUCK,
Appellants,

vs.

STATE OF NEW JERSEY,
by the State Highway Commissioner,
Respondent.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

JURISDICTIONAL STATEMENT

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Appellants appeal from the final order of the Supreme Court of the State of New Jersey, entered April 18th, 1967, reported in 49 N. J. 359, 230 A. 2d 393, denying petition for Certification to the Appellate Division of the Superior Court of New Jersey to review the judgment of the said Appellate Division entered on February 20, 1967, reported

at 94 N. J. Super. 84, 226 A. 2d 840, affirming a judgment of the Law Division of the Superior Court of New Jersey, entered on April 4th, 1966, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial constitutional question is presented.

Opinions Below

The Supreme Court of New Jersey did not write an opinion. Its order denying Appellants' Petition for Certification printed in Appendix A hereto, *infra*, p. 1a, is reported at 49 N. J. 359, 230 A. 2d 393. The Opinion of the Appellate Division of the Superior Court of New Jersey, printed in Appendix B, hereto, *infra*, p. 2a is reported at 94 N. J. Super. 84, 226 A. 2d 840. The oral opinion of the Law Division of the Superior Court of New Jersey, printed in Appendix C, hereto, *infra*, p. 7a is not reported.

Jurisdiction

The Appellee, State of New Jersey, by the State Highway Commissioner, commenced a condemnation action against a tract of land owned by the Appellants consisting of approximately five acres in the Township of Harding, County of Morris, State of New Jersey. Appellants duly filed an answer challenging the right of the Appellee to take the entire tract. The Law Division of the Superior Court of New Jersey proceeded in a summary manner by granting a hearing on the preliminary question as to whether the State had exceeded its authority under the New Jersey Statutes, and hearing was had on March 11, 1966, March 30, 1966, March 31, 1966 and April 4, 1966. The Court made a final decision on April 4, 1966, determining that the State of New Jersey was within its rights under the Statute in taking the entire

parcel. Its judgment was affirmed by the Appellate Division of the Superior Court on February 20, 1967. The Supreme Court of New Jersey entered its order denying petition for certification to the Appellate Division of the Superior Court on April 18th, 1967. A Notice of Appeal to this Court was filed in the Supreme Court of New Jersey on July 14th, 1967. On September 11th, 1967, the Hon. Nathan L. Jacobs, Associate Justice of the Supreme Court of New Jersey, signed a consent order for an extension of time to file the record, docket the appeal and file the Jurisdictional Statement, to and including October 16, 1967. Appellants time for docketing the appeal in this case was further extended to and including November 15, 1967, by order of Honorable William J. Brennan, Jr., Associate Justice of this Court, dated October 14th, 1967. Jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 20, United States Code, Section 1257(2), since the validity of a State statute was drawn into question on the ground that it is repugnant to the Constitution of the United States and it was held to be valid. The Statute in question is N.J.S.A. 27:7A-4.1. The verbatim text of said Statute, being found in Volume 27 of the N. J. Statutes Annotated, at page 132, is as follows:

> "Acquisition of Entire Lot, Block or Tract When Acquiring Property for Freeway or Parkway
>
> In connection with the acquisition of property or property rights for any freeway or parkway or portion thereof, the State Highway Commissioner may, in his discretion, acquire by gift, devise, purchase or condemnation, an entire lot, block or tract of land, if, by so doing, the interests of the public will be best served even though said entire lot, block or tract is not needed for the right-of-way proper but only if

the portion outside the normal right-of-way is landlocked or is so situated that the cost of acquisition to the State will be practically equivalent to the total value of the whole parcel of land; provided, however, that the State Highway Commissioner shall not have the power to acquire by the exercise of the right of eminent domain for any of the purposes of this act or any property or property rights owned or used by any public utility as defined in section 48:2-13 of the Revised Statutes. L. 1952 c. 21, p. 105 §1."

The following cases sustain the jurisdiction of the Supreme Court to review this judgment on appeal: *McPherson* v. *Blacker*, 146 U. S. 1 (1892); *Boyd* v. *Thayer*, 143 U. S. 135; *Berman* v. *Parker*, 348 U. S. 26 (1954); *O'Neill* v. *Leamer*, 239 U. S. 244 (1915).

Questions Presented

1. Does a substantial question arise under the Constitution of the United States, or of the State of New Jersey, which is of general public importance and which urgently requires an adjudication by this Court?

2. Is N.J.S.A. 27:7A-4.1 unconstitutional?

3. Is a Judge of the Law Division of the Superior Court of New Jersey entitled to make a determination of value, or does the law of the State of New Jersey vest this right solely in Condemnation Commissioners or, on appeal, in a Jury?

4. Can a condemning authority: i.e., the New Jersey Commissioner of Transportation (Highway Commissioner) take property from a private citizen for the exclusive use of another citizen?

Statement

Appellants, Thomas F. Buck and Mary P. Buck, are the owners, in fee simple, of lands and improvements thereon known as 666 Mt. Kemble Avenue in the Township of Harding, Morris County, New Jersey (D2a, 11 and 12; D10a-8 and 9). This property consists of approximately five acres of land and various buildings thereon and comprises all of parcels "30A" and "30B" as designated on the map attached to the Complaint herein (Exhibit B, D5a) and on the various exhibits admitted into evidence in this matter (S-1, S-2, S-3, D-4; D231a to D237a). Some portion of the premises designated "30A" by Appellee's engineers lies in the path of proposed construction of Freeway 287 and is being condemned for such construction. Appellants do not dispute the right of the Commissioner, in the exercise of his discretion, to take such portion of said premises.

However, these Appellants do dispute the right of the State to take that portion of said premises which lies to the Southeast of parcel "30A", which consists of the parcel designated "30B" as well as additional lands on the Southeast and Northeast of parcel "30A" (Exhibits S-3 and S-4; D166a-12 to D117a-19).

The lands in question are more easily identified by examiantion of the State's exhibits. They consist of all of that portion of Appellants lands which lie to the Southeast of a line represented by projecting a continuation of the Southeasterly line of the proposed right of way as it appears on either side of Appellants' property on State's exhibit "S-2" and include also certain portions on the Northwest side which lie outside of the right of way proper. The State admits (Exhibits S-3 and S-4) that its purpose in taking the portion known as "30B" is for use as a 10 foot wide gravel drive to serve a private property owner (Sheldrick)

to the Southwest of the Appellant's property, who will be left with a 5.308 acre landlocked piece (D54a-11 to D55a-19) after condemnation of the front portion of his lands for Federal Route 287. It is further admitted that the present zoning code in the municipality involved places both properties in a "AAA" residence zone which requires a minimum of three acres for a single building lot and single family residence.

The question of the validity of the statute involved was first raised in Appellant's brief in the trial court and in arguments of Appellant's counsel—also in the trial court. This question was not passed upon by the trial court. Also raised in the trial court was the question of whether the proposed taking was a taking of private property for private use (D204a-20 to D205a-7). This private property question was again raised in the Appellant's brief in the Appellate Division of the Superior Court as point IV thereof. The question of the validity of the Statute involved (N.J.S.A. 27:7A-4.1) was not raised in Appellant's brief in the Appellate Division inasmuch as Appellants placed a different construction on the Statute in point I of the same brief. When the Appellate Division, in its decision, rejected Appellant's construction of this Statute, the Appellants attacked the constitutionality of the Statute as construed by the courts below, in point IV of their Petition for Certification filed with the Supreme Court of New Jersey. This petition was denied.

The question of the constitutionality of taking private property for private use was also raised in points I and III of the Appellant's Petition for Certification.

How the Federal Question is Presented

(A) Law Division of the Superior Court

N.J.S.A. 27:7A-4.1 was attacked as invalid in the Court on the grounds that compliance with the Statute necessitated taking the function of determining land values, in condemnation actions, out of the purview of the Condemnation Commissioners, to be appointed, or out of the hands of the jury in the event of appeal, and further, that the construction of said Statute, urged by the State, would result in furnishing the State of New Jersey with Statutory authority to take private property for private use. The trial court held, in essence, that the amount and extent of the taking is left to the discretion of the legislative agent and will not be interfered with by the courts when said agent is exercising good faith. The court went on to find that it was the Appellants duty to show an abuse of discretion or failure on the part of the legislative agent to exercise good faith and that the Appellants had failed in such proof (Appendix C, *infra* p. 7a).

(B) Appellate Division of the Superior Court

Appellants argued both orally and in their brief, before the Appellate Division of the Superior Court of New Jersey, that under no circumstances, and even upon just compensation being made, can the State take private property for private use, setting forth the Fifth Amendment of the Constitution of the United States as well as Article I, paragraph 20 of the Constitution of New Jersey and citing appropriate New Jersey authorities. Appellants, also argued that there was an abuse of discretion in the instant case by the State Highway Commissioner and, further, that the trial court did not properly construe N.J.S.A. 27:7A-4.1. By implication the Appellate Division held that the said statute, and the construction placed on same by the

trial court, was constitutional in holding that the State Highway Commissioner could acquire Appellants entire tract notwithstanding the fact that the condemnation of the disputed portion would serve a private interest—finding that it was sound business judgment and in the public interest to take the entire parcel (Appendix B, *infra*, p. 2a).

(C) Supreme Court of New Jersey

The validity and constitutionality of N.J.S.A. 27:7A-4.1 was challenged in the Supreme Court of New Jersey on the grounds that it was in violation of both the Constitutions of the United States and of New Jersey, as aforesaid.

The Supreme Court denied Appellants' petition for Certification, without opinion (Appendix A, *infra*, p. 1a).

The Questions Are Substantial

The questions are substantial because they involve, among other things, the validity of a statute of the State of New Jersey (N.J.S.A. 27:7A-4.1), which, by the construction given said statute in the instant case by the courts of the State of New Jersey, a State agency is enabled to condemn the private property of one man for the admitted exclusive use of another. The Doctrine of Eminent Domain has never been extended to include this right. It is repugnant not only to the Constitutions of the United States and of New Jersey but is repugnant to all basic concepts of our heritage. Appellants contention is, and has been, that the New Jersey Legislature, in exacting the subject statute, intended, when it included the language: "if, by so doing, the interests of the public will be better served . . ." that some actual use by the public would be made of the property being so taken. The decisions of the New Jersey courts in this case indicate, on the other hand, that the requirements of the statute have been satisfied upon a showing that the acquisition of the disputed portion

is of some economic advantage to the State in its overall highway program. Appellants submit that this reasoning, applied to hundreds or even thousands of similar situations within the State, will provide the State of New Jersey with the opportunity of condemning private property and applying same to private use without regard to any constitutional prohibition. In effect, the State's construction of the statute would permit the State to condemn private property for private use if in so doing the state would have a financial advantage. Carried to its infinite conclusion, the State would be permitted to acquire any private property adjacent to any highway construction and extend the use of the acquired land to private users.

Chief Justice Charles Evans Hughes, of this Court, in *O'Neill* v. *Leamer*, 239 U. S. 244, 36 Sup. Ct. Rep. 54 (1915) stated, in part, in dealing directly with the question as to whether a substantial Federal question was raised and whether jurisdiction attached, in a case where the Appellants charged that a Minnesota statute was invalid because it authorized the taking of private property for a private use:

> "... But we think that the plaintiffs sufficiently raised the question whether the appropriation was essentially for a private purpose, and hence contrary to the 14th Amendment as amounting to a depravation of property without due process of law, and that their contention as to their Federal right in this respect was denied by the state court. In this view jurisdiction attaches." (Citing numerous cases).

The importance of the questions herein lie not only in the fact of the tremendous size of the Federally supported highway program currently underway in the State of New Jersey, but because the instant case, as it now stands con-

cluded in the State of New Jersey, furnishes precedent for the continuing and probably ever-expanding acquisition of private properties for any use whatsoever. In other words, the State can condemn private property for any use whatsoever, providing only that it meets a vague financial advantage to the State. The precedent now standing in the State of New Jersey is a hole in the dyke of constitutional protection of a private citizen's right to own property. Only the Supreme Court of the United States has the finger to plug this hole.

In *U. S. ex rel. TVA* v. *Welch et als.*, 327 U. S. 546, 90 L. Ed. 843 (1946) Mr. Justice Black held that it can be the function of Congress to determine what type of taking constitutes a public use. However, Mr. Justice Frankfurter, in a concurring opinion, sustained the right of this Court to ultimately determine the question, stating:

> "This Court has never deviated from the view that under the Constitution a claim that a taking is not 'for the public use' is open for judicial consideration ultimately by this Court . . . I assume that in citing these cases the Court again recognizes the doctrine that whether the taking is for a public purpose is not a question beyond judicial competence."

It is also significant to note that the New Jersey statute, under attack, is a part of the general condemnation act of New Jersey and not a part of the specific legislation authorizing the construction of the proposed highway.

See also *Old Dominion Land Company* v. *U. S.*, 269 U. S. 55, 70 L. Ed. 162.

Chief Justice Fuller of this Court, in *McPherson* v. *Blacker*, 146 U. S. 1 (1892) stated, in dealing with the question of the jurisdiction of this Court:

> "But the judicial power of the United States extends to all cases in law or equity arising under the Constitution and law of the United States, and this is a case so arising, since the validity of the State law was drawn into question as repugnant to such Constitution and law, and its validity was sustained."

The so-called "Vester Rule" was enunciated by Chief Justice Hughes in 1930, in *Cincinnati* v. *Vester*, 281 U. S. 439, 74 L. Ed. 950 as follows:

> "It is well established that in considering the application of the 14th Amendment to cases of expropriation of private property the question what is a public use is a judicial one. In deciding such a question, the Court has appropriate regard to the diversity of local conditions and considerations with great respect to legislative declarations and in particular the judgments of State courts as to the uses considered to be public in the light of local exigencies. But the question remains a judicial one which this court must decide in performing its duty of enforcing the provisions of the Federal Constitution."

That case dealt with the validity of an ordinance of Cincinnati authorizing "excess condemnation" of private lands in conjunction with the widening of a road. It is very similar, in its factual considerations, to the case *sub judice*. The "Vester Rule" was, perhaps, to some extent modified by the expression of this Court made by Mr. Justice Douglas in *Berman* v. *Parker*, 348 U. S. 26, 99 L. Ed. 27:

> "In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia (citing

cases). This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one (citing cases)."

Appellants urge that while the *Berman* case has, to some degree, modified the holding of the *Vester* case, it has not eliminated the basic function of this Court in determining whether a particular piece of legislation violates the Constitution.

In the instant case, no substantial quarrel is made to the legislative right to condmen for a public highway. But Appellants urge the Court's consideration of a specific instance of a taking of private property for private use as admitted by the State as being a "6 inch gravel driveway" only "ten feet wide" and running only to a single family residence which cannot be further developed.

Appellants urge that the statute is defective also because it imposes upon the state court judge the duty of determining the value of the property (to decide what is "practically equivalent" as indicated in the statute). This, of course, becomes a part of public record in a public proceeding, at a time prior to any hearing before the condemnation commissioners, who, by New Jersey statutes, are to be appointed in every condemnation action for the exclusive purpose of making that very determination, thus denying the Appellants due process of law. Additionally, the condemnation act of New Jersey provides for an appeal, as a matter of right, from such award as the commissioners may make—such appeal to be by way of jury trial—affording the parties to the action their constitutional right of trial by jury. Appellants here urge that the statute question, by its very terms, denies the parties to a condemnation action, where-

in the entire taking is disputed, the right to a trial by jury of the issues of the value of the parcel or parcels to be condemned.

The fact that in the case before the Bar there has been a proceeding pursuant to the statute under attack, in which the trial judge made a finding as to the value of Appellant's entire premises, as well as a finding as to the value of the disputed portion and the value of the remainder, coupled with the fact that Appellants have yet to have their hearing before the commissioners or have exercised their right of appeal *de novo*, before a jury, is illustrative of the denial of due process, in this case, and a clear violation of the 14th Amendment of the United States Constitution.

CONCLUSION

The matter before this Court raises very substantial questions, of public importance, under the 5th and 14th Amendments of the U. S. Constitution and Article 20 paragraph 1 of the Constitution of the State of New Jersey which warrant resolving by this Court. It is most respectfully urged that jurisdiction should be noted and the judgments and orders below reversed.

Respectfully submitted,

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[APPENDICES FOLLOW]